

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
JOSEPH J. AND JULIA A. BATTLE)

For Appellants: Touche Ross & Co.

For Respondent: Crawford H. Thomas
Chief Counsel

Richard A. Watson
Counsel

O P I N I O N

This appeal is made pursuant to section 19059 of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claims of Joseph J. and Julia A. Battle for refund of personal income tax in the amounts of \$33.00 and \$317.00 for the years 1965 and 1966, respectively, and pursuant to section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Joseph J. and Julia A. Battle against a proposed assessment of additional personal income tax in the amount of \$466.90 for the year 1967.

The sole issue presented is whether appellants were entitled to use the income averaging provisions of the Revenue and Taxation Code in computing their California personal income tax liabilities for 1965, 1966, and 1967.

Appellant Joseph J. Battle is a dentist who resides, with his wife Julia and their six children, in Walnut Creek, California. Prior to entering military service in September of 1961, appellant lived with his parents in Sherman Oaks, California. Upon entering the service, appellant was assigned to a duty station in Nevada, where he remained until his discharge in September

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of 1963. The record does not reveal where appellant's wife and children resided during this period. Immediately after appellant's discharge, however, he and his family traveled directly to New York, where they resided with appellant's father-in-law until June of 1964. In that month they returned to California and have resided here ever since.

Appellants did not file California returns for the years 1961-1964, inclusive. They did file returns for 1965 and 1966, but these returns did not use income averaging. After filing a 1967 return which elected the benefits of income averaging, appellants filed claims for refund of their 1965 and 1966 taxes on the grounds that they were also entitled to average their income for those years. Respondent denied the claims for refund and issued a proposed assessment of additional tax for 1967, all on the grounds that appellants did not meet the residency requirement of the income averaging provisions.

Revenue and Taxation Code section 18243, subdivision (b), provides that an individual is not eligible to average his income "... for the computation year if, at any time during such year or the base period, such individual was a nonresident. " (Emphasis added.) The term "computation year" means the taxable year for which the taxpayer chooses the benefits of income averaging, and the term "base period" means the four taxable years immediately preceding the computation year. (Rev. & Tax. Code, § 18242, subd. (e).) In the present case each of the years 1965, 1966, and 1967 is a computation year, and their respective base periods are 1961-1964, 1962-1965, and 1963-1966.

Appellants have the burden of proving their eligibility to average their income. (Appeal of Herbert H. and Darlene B. Hooper, Cal. St. Bd. of Equal., Feb. 26, 1969.) For the purposes of this appeal, the effect of that burden is to require appellants to establish, with respect to each computation year, that they were not nonresidents of California at any time during that year or during the base period applicable to that year. The term "nonresident" means every individual other than a resident. (Rev. & Tax. Code, § 17015.) The term "resident" is defined by Revenue and Taxation Code section 17014 to include:

(a) Every individual who is in this State for other than a temporary or transitory purpose.

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(b) Every individual domiciled in this State who is outside the State for a temporary or transitory purpose.

Any individual who is a resident of this State continues to be a resident even though temporarily absent from the State.

Under the peculiar facts of this case, appellants cannot prevail with respect to any computation year unless they establish that they were residents of California, within the meaning of subdivision(b) of section 17014, during the time they were in New York. This is true because the period from September 1963, through June 1964, comprises part of the base period for each of the three computation years .

In our opinion the evidence in this case falls far short of establishing the temporary or transitory nature of appellants' nine-month stay in New York. Appellants' only statement with regard to this matter is that they went to New York to "visit" Mrs. Battle's parents. As respondent points out, however, the fact that appellants went to New York for one purpose does not preclude the possibility that they remained there for other reasons. Appellants have, in fact, provided no details concerning this rather lengthy period. For all that appears in the record, Mr. Battle may have tried to establish a dental practice in New York at this time but for some reason changed his mind and decided to return to California. Be that as it may, we know so little about the nature of appellants' connection to either California or New York during these months that we cannot possibly say that appellants had their closest connection with California and, thus, were California residents.

Under these circumstances, we can only find that appellants have failed to establish that they were eligible to use income averaging during any of the years 1965, 1966, or 1967. Accordingly, respondent's action will be sustained in all respects.


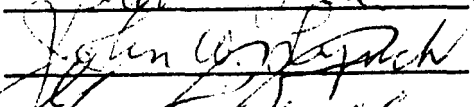
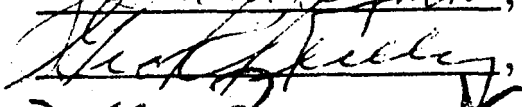
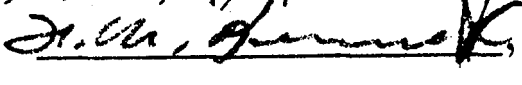
O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

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IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 19060 of the Revenue and Taxation Code, that the action of the Franchise Tnx Board in denying the claims of Joseph J. and Julia A. Battle for refund of personal income tax in the amounts of \$33.00 and \$317.00 for the years 1965 and 1966, respectively, and pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Joseph J. and Julia A. Battle against a proposed assessment of additional personal income tax in the amount of \$466.90 for the year 1967, be and the same are hereby sustained.

Done at Sacramento, California-, this 5th day of April , 1971, by the State Board of Equalization.

, Chairman
, Member
, Member
, Member
_____, Member

ATTEST: , Secretary